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No. 89-612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE DE LA COVA, DOROTHY JESSUP, Individually and on Behalf of all Other Persons Similarly Situated,

Petitioners,

– against –

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ..... *passim*

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Introduction

Petitioners Roberta Ottaviani, Carolee Schneemann, Joan Marie de la Cova and Dorothy Jessup individually and on behalf of a class (hereinafter "petitioners") seek review of the judgment and decision of the United States Court of Appeals for the Second Circuit, dated May 9, 1989, unanimously affirming the decision of the United States District Court for the Southern District of New York, dated January 11, 1988, which dismissed all of petitioners' claims of sex discrimination in employment brought against the State University of New York ("SUNY") at New Paltz ("New Paltz") and Clifton R. Wharton, Jr. ("respondents") pursuant to 42 U.S.C. 2000(e) *et seq.* ("Title VII"). (A2-A27) Specifically, the Court of Appeals affirmed the

District Court's determination that petitioners had failed to show, either on a classwide or on an individual basis, that women faculty in the Division of Liberal Arts and Sciences at New Paltz (the "Division") were treated differently on account of their sex with regard to initial placement into rank, current rank and salary. Based upon its review of the record, the Court found, that the District Court's rejection of petitioners' statistical and anecdotal evidence was not clearly erroneous. The Court also held that, with regard to their classwide claims, "the burden of persuasion was on the petitioners to prove by a preponderance of the evidence that there was a pattern or practice of discrimination at SUNY, New Paltz, and they failed to meet that burden." (A.27) The Court's finding in this regard applied not only to the eleven year post-Act period in issue but also to the period of time prior to the effective date of Title VII.

Because the holding of the Court below is narrowly confined to the facts presented at trial and because the Court's opinion presents no conflict with decisions of this Court or with other Circuits, this Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

A. *Background*

New Paltz, one of 29 SUNY campuses, was a campus in financial crisis during the entire class period. Indeed, by the late 1970's, there was concern that the college would be closed. (SA 418, 419) Student enrollment began to drop in 1971-72. From 1975-76 to 1985-86, enrollment declined 19% as compared with a 6% decline for the University as a whole. These declines had a direct negative effect on New Paltz's operating budget.

The Governor directed New Paltz administrators to achieve fiscal saving by not filling faculty lines as they became open; filling lines slowly; and filling lines at lower than usual salaries. (SA 328, 344) In 1975, eleven lines were eliminated. In 1978, six more were cut. (SA 422, 423) Between 1975 and 1985 New Paltz lost 42 faculty lines. (SE 105)

In addition, New Paltz was forced to retrench faculty. (SE 426) In 1976, six males and two females were retrenched. (SA 421) In 1979, 21 faculty members, 19 of whom were male, were retrenched due to further program cuts. (SE 426) No females in the Division were retrenched. (SE 426)

The budget crisis also had a significant impact on faculty promotions. Beginning in 1974, pressure was exerted on New Paltz by the Governor and SUNY to limit the number of promotions made. (SA 454; SE 62) From 1978-1980, the New York State Division of the Budget continued that pressure by imposing a "faculty rank adjustment" which deleted $200,000 from New Paltz's budget. (SA 329-32) Nevertheless, during that time, women at New Paltz were promoted as quickly as the men. (E 493-94) Moreover, between 1980-84, women were promoted to the rank of associate professor at a higher rate than men (SA 745) and several women were promoted to the rank of professor. (SA 750)

Notwithstanding the financial crisis, New Paltz was committed to equal employment opportunity ("EEO") and pursued its affirmative action goals throughout the class period. The Affirmative Action Officer ("AAO"), initially hired in 1971 (SA 301, SE 108, 111), participated in all decisions regarding hiring, tenure, renewal and promotion. (SA 427, 357, 361, 368, 398) Under the direction of the AAO, EEO reports were maintained and statistics were monitored. (SA 358-60) These reports showed that, overall, women fared as well as men in the face of the budget crisis. For example, a summary of renewal decisions made between December 15, 1973 and June 15, 1979 showed that 87% of the women and 87% of the men were renewed. (SE 407) From 1980-84, all women considered for contract renewal were renewed. (SE 139) Moreover, even in years when there were many terminations, the numbers showed that the campus maintained a favorable replacement pattern for women. (SA 254-55; SE 427) The percentage of females at New Paltz increased slightly, from 21% in 1975 to 23% in 1979. (SE 53) Between 1980 and 1986 the number of female administrators increased from 13 to 31. (SA 727-30; SE 1, 2) Between 1981-86, 42% of all full-time hires were females. (SE 224)

In addition, between 1973-79, 75% of the women reviewed for tenure were granted tenure, while only a slightly higher percentage – 77% – of the men were granted tenure. (SE 139, 405) Tenure was granted to two-thirds of the women faculty who were considered between 1980-84, but to only 55% of the men. (SA 744)

From 1973 through 1980, the AAO also conducted annual salary reviews to identify salary inequities[1] (SE 51, 474, 478, 489, 495, 499, 554) and made adjustments where appropriate. (A 61) In contrast to other campuses, New Paltz was singularly concerned with pay equity. (SA 431)

B. *Proceedings Below*

On December 27, 1977 Roberta Ottaviani, who was a full-time faculty member of the Division at New Paltz from 1967 to 1974, filed the complaint in this case. Petitioner Ottaviani ("petitioner") claimed that New Paltz had discriminated against her on the basis of sex in regard to the terms and conditions of her employment, including hiring, promotion, tenure and salary. On April 27, 1979, a motion to intervene additional plaintiffs was granted.

A class was certified on May 19, 1978. By stipulation, it was redefined as all full-time academic rank female faculty members employed in the Division at New Paltz at any time during the period starting in the Spring of academic year 1973-74 through the Fall of academic year 1984-85. Class claims were limited to placement into initial rank, current rank and salary. (SA 1-5)

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[1] "Inequity" in the salary review context within SUNY does not refer to "discrimination" on account of sex, but refers to all persons who receive unequal salaries. Salary differences may be based on legitimate factors such as difference in rank, number of years of service, and highest degree attained, as well as some less quantitative variables such as publications, community service, professional service, teaching effectiveness and unique conditions within particular departments. (SA 293-94)

1. *The Trial*

Trial commenced on June 10, 1986. The sole question presented was whether New Paltz treated females differently from their male counterparts. (A. 18, 19) On April 8, 1987, after petitioners' rebuttal case, the trial record was closed by the District Court. (SA 771-72)

a. *The Statistical Evidence*

Petitioners presented a number of statistical studies in support of their salary claim. Their main salary studies consisted of multiple regression analyses for all faculty employed from 1973 to 1984 which purported to show that females in the Division at New Paltz received lower salaries than comparable males. Respondents showed, however, that petitioners' statistical methods were deficient in important respects. Petitioners' use of a males-only regression not only resulted in an overestimate of gender-based differences in salary (A 48), but also resulted in inappropriate comparisons between women and men with different characteristics. (SA 709) For example, in the natural sciences, the average male is an associate or full professor, and a males-only regression predicts a female instructor or assistant professor's salary on the basis of those in senior ranks. (SA 709-10) Moreover, male counterparts were unavailable in some Departments, notably the highly paid all-female nursing faculty, who were omitted from petitioners' main studies. (SA 703, 711-12)

In addition, petitioners' exhibits including a rank variable, inappropriately aggregated instructors and assistant professors into a single rank. (SA 266-72, 755-57) This had the effect of predicting instructors' salaries on the basis of the salaries of assistant professors, and showing a spuriously large deficit from the predicted salary in the case of women instructors. When petitioners finally produced studies where rank was more appropriately specified, salary disparities fell below 2.33 standard deviations in eight out of eleven years. (SE 688, 701) Finally, the set of variables considered by petitioners in all of their salary regressions was shown to be incomplete and incorrect.

Respondents not only demonstrated why petitioners' statistics were deficient, but also introduced their own studies for faculty

employed in the Division between 1973 and 1984. (E 425, 501-02 and supporting appendices in Ex. S6-A) In contrast to petitioners' studies, respondents' studies show *no* year in which the disparity between male and female salaries equals or exceeds two standard deviations. Respondents' studies also demonstrate that the differences between women's observed and regression-predicted salaries are randomly distributed. (SE 342)

Respondents' expert also separately studied initial salaries and salary increases during the class liability period. (E 495-500, 503) These studies showed that the difference between male and female starting salaries is not statistically significant and that, females' salaries increased faster than males'.

In addition respondents separately analyzed salaries for 1971 and 1972. The analysis of salaries of persons hired before 1972 showed no statistically significant differences between male and female salaries in those years. (E 507) Although this Court rendered its decision in *Bazemore v. Friday*, 478 U.S. 385, (1986) before petitioners presented their case-in-chief, petitioners did not separately study gender-based differences in salary for the group of persons hired before 1972 when Title VII became applicable to SUNY.

The experts disagreed as to whether academic rank could be used in this case as a legitimate independent variable accounting for male/female salary differences.[2] Petitioners asserted that rank is "tainted", but did not introduce any statistically validated evidence in support of this assumption. (SA 639-40, 644) Petitioners' exhibits purporting to show that rank is tainted (SE 639; E 261, 285, 372, 397, 373, 423) are, essentially, either lists and cross-tabulations of certain categories of faculty without valid statistical tests (SA 764; E 435), or salary studies which do not measure the statistical significance of gender differences in rank distribution at all. (E 397, 423) For example, petitioners' "proof" that current rank is tainted consisted of nothing more than salary studies showing only that male/female differences in salary are

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[2] As the Second Circuit noted, although petitioners challenge respondents' use of the rank variable, their own expert explained that rank could be used as a measure if it is not tainted. (A 23)

in large part attributable to the differences in male/female distributions in rank. They do not show, however, that such differences in rank distribution are statistically significant, or that they are discriminatory. (SA 755-57, 770)

Petitioners' only other exhibit in this regard concerned promotion. (E 285) This exhibit similarly failed to incorporate relevant information and, therefore, was non-probative as to rank. Thus, it includes all faculty, whether hired pre- or post-1973, identifies the number of faculty members promoted during the years 1973-84 by gender and rank, and shows the average number of years to promotion (of those promoted) by gender and rank. However, the exhibit does not reflect the qualifications of those promoted and not promoted, and provides no statistical analysis of differences in male and female rates of promotion. (E 436)

In addition to showing the deficiencies in petitioners' presentation concerning rank, respondents' expert presented independent evidence that when male/female differences in qualifications are considered, gender is not a significant influence on placement into rank or on promotion. (E 440-49, 488-94; SA 637-701)[3] For example, respondents showed that male and female faculty members possessed significantly different qualifications at hire. (E 488) The average female hired during 1973-84 was less likely to have a Ph.D. or a publication at time of hire; had fewer years, on average, of prior college teaching, related research and other related experience; and was less likely to have held a prior academic teaching rank or one higher than an entry level rank than the average male hired during the same time period. (SA 658-59) Given these differences in qualifications, it is expected that, in the absence of any disparate treatment, the initial rank of the average female hired would have been lower than that of the average male hired. (SA 659)

There was no showing by petitioners that there were statistically significant differences in the distribution of female/male in current rank, much less a showing that such distribution is attributable to discrimination at New Paltz. Nevertheless,

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[3] For a large number of the 26 class members hired prior to 1973, defendants also presented anecdotal evidence as to the appropriateness of their initial rank.

respondents examined rank in three ways: (1) female/male differences in assignment to initial rank (SE 342, Tables 1-7); (2) female/male differences in probability of being promoted (SE 342, Table 10); and (3) female/male differences in waiting time before promotion. (SE 342, Table 9) Respondents showed that a woman's likelihood of being promoted and average waiting time to be promoted is not significantly different than a man's. (E 493-94) By addressing initial rank, likelihood of promotion and time to promotion, respondents' presentation completely rebutted petitioners' allegations that rank is tainted and showed convincingly that rank at New Paltz is gender neutral. (SA 673-74)

b. *Anecdotal Evidence*

Petitioners' anecdotal evidence with regard to pre-1973 hires consisted solely of a report prepared by the Committee on the Status of Women ("CSW") in 1974 at the request of the President,[4] and testimony from four members of the class, including petitioner Ottaviani, two non-class faculty members, and one librarian.[5] The class witnesses represented only three of the more than twenty departments in the Division, *i.e*, foreign languages, sociology and speech. Petitioners produced no evidence to support their contention that women hired before 1972 were assigned to rank in a discriminatory fashion.[6]

Respondents' anecdotal evidence included summaries of more than twenty personnel files which reveal that, in the 1960's, women were treated the same as or more favorably than men.

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[4] The CSW report was initiated by the President to investigate pay equity. (SE 473) However, it was of poor quality and conceded, by its author, to be unreliable. (SA 300)

[5] Petitioners offered and the Court accepted anecdotal evidence about librarians, although librarians are not teaching faculty at SUNY. However, complaints about librarians' salaries focused on the comparison between librarian and non-librarian salaries, and not upon any male/female comparisons. (SA 88-90, 91-92, 93, 94-96, 248, 249; SE 138)

[6] Petitioners state that "there were separate tenure tracks for men and women." Pet., page 5. However, there is no evidence of this in the record. The citation to the transcript relied upon by petitioners reveals only that in 1969, a female non-class member who is a teacher of dance, was not appointed as track and field coach or as athletic director. (T. 300, 301)

For example, between 1966-70, a man with a Ph.D. and more than ten years of full-time prior teaching experience was hired in the English Department into the same rank as women without their Ph.D., with only two years of experience and no publications. (SE 113) Moreover, while three women were hired in English prior to 1972 with very recent Master's ("M.A.") degrees, no teaching experience, and no publications, there were no men hired in English with so few credentials. (SE 113) The evidence further showed that both males and females, were quickly promoted to the rank of assistant professor before completion of their Ph.D., including petitioner Ottaviani and several other class members hired before 1972.

Petitioners' anecdotal evidence with regard to persons hired in the post-1973 period similarly consisted of isolated and sporadic instances of alleged discrimination. In addition to named petitioners Dorothy Jessup, Joan de la Cova and Carolee Schneeman (discussed *infra* at pp. 9-13), the only other testimony petitioners presented in this regard was that of three other women hired after 1973, two of whom were members of the class. Respondents produced direct evidence which countered petitioners' allegations and showed that in each case the administration had a legitimate reason for the challenged decisions.

Finally, petitioners sought to show that the administration was indifferent to women's issues, as evidenced by its alleged failure to give proper treatment or recognition to women's studies. Respondents demonstrated, however, that the College's administrators have consistently shown a high level of commitment to the program. (SE 225) In fact, New Paltz is one of very few institutions to offer an undergraduate major and minor in Women's Studies and to provide an opportunity for a graduate degree with an emphasis in Women's Studies. (SA 281-82) The program at New Paltz was the first in the SUNY system to offer a Bachelor's Degree. (SA 280)

c. *Individual Claims*

(i) *Roberta Ottaviani*

Roberta Ottaviani was hired in September, 1967 as an instructor in the Speech Department at a salary of $8,000 per year.

This salary, which was based on Ottaviani's M.A. degree and prior non-college teaching experience, was, in fact, higher than Ottaviani would have accepted. (E 149)[7] In June 1968, she was promoted to the rank of assistant professor.

In 1971, 1972 and 1973, Ms. Ottaviani was considered for and denied promotion to the rank of associate professor. She was not recommended by her Chair or by the Central Committee for promotion (SA 305), and each review indicated that Ms. Ottaviani had demonstrated no progress towards the completion of her Ph.D..[8] (SE 257, 258, 259)

A March 23, 1972 memorandum from the Chair of the Speech Department, to the Vice President for Academic Affairs, which recommended that Ms. Ottaviani not be promoted (E 424), states:

> I understand from our department subcommittee that Mrs. Ottaviani bases her case for promotion primarily upon her work in the caucus on women's rights which she interprets as falling under the trustee's criteria of university service. I can attest to the fact that Mrs. Ottaviani has worked hard and long in her support for the movement for equal opportunities for women and that her efforts in this direction have received university-wide recognition. I am concerned that during the more than 4 1/2 years Mrs. Ottaviani has been a member of the faculty, we have no tangible evidence of advanced academic study beyond the Master's degree ...

In 1973, Ms. Ottaviani was denied promotion again because she had "failed to produce concrete evidence that her potential

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[7] There were no males hired in Speech in 1967. In 1966, a male who had completed an M.A. degree, and had taught for one year was hired into the same rank as Ms. Ottaviani at a salary of approximately $7,600. (SA 602; SE 271)

[8] Ms. Ottaviani has never received a Ph.D.. (SA 25)

would be fulfilled." (SA 307; SE 532, 259, 257) She was also considered for and denied tenure in 1973 under the criteria set forth in the SUNY Policies of the Board of Trustees. (SE 227) The Central Committee recommended non-reappointment for Ms. Ottaviani because "her dossier indicated limited professional growth and that the actual progress in the last six years on the doctorate did not suggest any firm commitment to it". (SA 308; SE 529) The President's determination was consistent with the recommendation of the Central Committee and relied, *inter alia*, on Ottaviani's failure to make significant progress toward a Ph.D. and her failure to even formally enroll in a program leading to the degree. (SE 408)[9] The eight other females considered for tenure at New Paltz in 1973 received it. (SE 139)

(ii) *Joan de la Cova*

Ms. de la Cova was employed in 1973 as an instructor in the Spanish Department. (SA 136) In Spring 1978, she was informed that, for budgetary reasons, her contract would not be renewed. She filed an AAO grievance in which she compared herself to a male in the Department who was retained, although he had one less year of seniority. Her complaint was reviewed by the AAO and a report was issued which concluded that the non-renewal was not based upon sex. (SE 542)

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[9] A male was tenured in 1970, although he had not completed the Ph.D.. However, he had offers from two other universities, had recently completed a one year fellowship at New York University and had taken additional graduate credits. By 1970, he had completed 57 credits towards his doctorate. (SA 468-71; SE 55)

Another male was granted tenure in 1975, who had been pursuing his doctorate at Penn State University for three years and was planning to spend the following year in residence at Penn State to complete his degree (SA 474-77; SE 3). His file showed that "since he received the masters he had earned a total of 64 graduate credits, and has embarked on a formal doctoral program at Penn State. He recently completed a qualifying examination under supervision". (SA 477; SE 3, 11) Both of his respective departments gave him positive, strong recommendations for tenure citing his progress toward his Ph.D..

Ms. de la Cova was not comparable to the male (SA 425, 540), and she conceded as much in a letter she wrote to the Central Committee on Tenure and Reappointment. (SE 401) There she notes his special abilities and significant contribution to New Paltz. In addition to coordination of the bilingual program, he obtained several grants for New Paltz each year totalling nearly $500,000. (SA 222-23) Ms. de la Cova could not serve as a substitute for him in the bilingual education program because she had no experience in that area. (SA 245-47)

(iii) *Dorothy Jessup*

Dorothy Jessup was hired by New Paltz in 1973 as an assistant professor in Sociology. (SA 27-28; Exh. 976) She had received her Ph.D. and had two years of full-time college teaching experience, but no significant publications. (Exh. 976) At the time she was interviewed, she was told that she would be expected to publish. (SA 30)

By 1976, she had published only one book review. (SA 39, 40) An article submitted to the *American Journal of Sociology*, was rejected. (SA 47) On December 23, 1976, Dr. Jessup was advised by the *Journal of Sociology of Education* that the same article required a "major overhaul". (SA 41, SE 300) As of May 4, 1977, Dr. Jessup was advised that the article's emphasis should be changed by some "substantial reorganization". (SA 42, SE 233) When Dr. Jessup was considered for tenure in the Spring of 1977 (SA 33), there was no indication in her tenure file that this article would ever be accepted for publication. (SA 43)

Dr. Jessup was denied tenure on August 1, 1977. (SA 37)[10] because of her meager scholarly activity during the preceding

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[10] That same year, a male was denied tenure for the same reasons. Both he and Jessup subsequently received tenure in 1979. (SE 527)

Although a male in Sociology was granted tenure in 1977, he had significant publications and had received a grant. (SA 536, SA 44) Also, by Spring 1977, he had presented a third major article that had been accepted for publication and had received a fellowship. (SA 44)

years and because reports on her teaching were mixed. (SE 466) Moreover, a significant proportion of the Sociology Department did not recommend her. (SA 38)

(iv) *Carolee Schneemann*

Carolee Schneemann, non-class member, taught an introductory course in filmmaking, part-time, for three semesters in the Art Studio Department starting in the Spring of 1977. (SA 188-89) Each of her appointments was for one semester only. (SA 190; SE 557) Her appointment letters, which she signed in each case, clearly stated that, as a temporary employee, her position could be terminated at any time under the Policies of the Board of Trustees. (SA 205; SE 557) After the Spring semester of 1978, she received no further appointment. (SE 553)

There was no evidence presented that her termination was based upon gender. In fact, it was shown that during the next seven years the course was taught by a woman. (SA 203)

2. *The Decisions Below*

On January 11, 1988, the District Court dismissed the complaint as to all of the class and individual Title VII claims. The District Court concluded that petitioners' evidence, taken as a whole, failed to prove sex discrimination in salary, rank and initial placement into rank.

On May 9, 1989, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court in all respects (A2-27). The Court found that petitioners had failed to show that there was a pattern and practice of discrimination at New Paltz and that all of petitioners' arguments were without merit. Thus, in accordance with this Court's decisions, the Court below rejected petitioners' contention that a showing of two or three standard deviations should automatically be equated with a *prima facie* case. Moreover, the Court found that, in this case, it is irrelevant whether petitioners' statistics alone established a *prima facie* case since they had an opportunity to fully litigate all of their claims on the merits.

The Court further rejected petitioners' claim that they had shown that rank was discriminatory at New Paltz. The Court held that "plaintiff failed to adduce any significant statistical evidence of discrimination as to rank" and found that "the respondents, on the other hand, offered persuasive objective evidence to demonstrate that there was no discrimination in either placement into initial rank or promotion at New Paltz between 1973 and 1984." (A.23)

The Court also concluded that petitioners' attempt to establish a claim under *Bazemore v. Friday*, 478 U.S. 385 (1985) was unfounded in this case because they failed to introduce any statistical evidence of substance to prove that New Paltz had engaged in sex discrimination prior to the effective date of Title VII. Finally, the Court concluded that this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. ____, 104 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), did not apply to any of petitioners' claims. The Court, which was familiar with the record in this case, found no evidence of "mixed motives" for any of their claims.

Reasons For Denying The Writ

A. *The Decision Of The Court Below Is Not In Conflict With* Price Waterhouse v. Hopkins.

Petitioners claim that this case should be remanded for consideration of their claims under the standard set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989) i.e., would the decisions in issue have been the same if petitioners were male. Indeed, they seek to apply it to all of their claims, including those of the class. However, as the Second Circuit expressly stated, "[t]he Supreme Court's recent decision in *Price Waterhouse v. Hopkins*, [citation omitted], does not affect our analysis of these petitioners' claims." (A-12, 13 n.5) Thus, contrary to petitioners' suggestion, this is not a case in which the Court below ignored or failed to follow an opinion of this Court. Moreover, petitioners' argument betrays a misunderstanding of the issue addressed in *Price Waterhouse*.

In *Price Waterhouse*, a majority of this Court held that if an employee shows that an adverse employment decision was the result of "mixed motives" and that the discriminatory motive was a substantial motivation for the employer's action, then and only then does the burden of persuasion shift to the employer to prove by a preponderance of the evidence that the same decision would have been made in the absence of any discriminatory motive. 490 U.S. at ____, 109 S. Ct. at 1788. The decision in *Price Waterhouse* was not intended to overrule or modify the existing legal standard, previously expressed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). 490 U.S. at ____, 109 S. Ct. at 1788, 1796. Instead, it was intended to supplement the Title VII analysis in limited cases where a disparate treatment plaintiff produces direct evidence that an illegitimate criterion was a substantial factor in the decision. (O'Connor, J., 490 U.S. ____, 109 S. Ct. at 1796). Moreover, contrary to petitioners' assumption, it has no application to classwide Title VII claims.[11]

This Court carefully noted, as well, that "stray remarks" or a mere isolated or ambiguous comment by a supervisor would be insufficient to shift the burden of proof to the employer (O'Connor, J., 490 U.S. at ____, 109 S. Ct. at 1804). Rather, it is the plaintiff's burden to show in the first instance that the employer actually relied on gender in making its decision. (Brennan, J., plurality opinion; 490 U.S. at ____, 109 S. Ct. at 1804.)

Petitioners in this case have failed to show that they meet the burden imposed by *Price Waterhouse*, and the Court below correctly so held. They did not produce any direct evidence that there were "mixed motives" involved in any of the decisions affecting the class or any individual at New Paltz, much less that any classwide or individual employment action was substantially motivated by gender. The proof offered in support of the

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[11] If petitioners had established their class claims that sex discrimination was pervasive at New Paltz, as they contend they did at p. 17 of the Petition, there would have been no reason for the Court below to rely on *Price Waterhouse* since petitioners would have prevailed under a *Burdine* analysis.

classwide claims consisted only of petitioners' flawed statistical presentation, found to be insufficient to establish a *prima facie* case even under *Burdine* standards, and their anecdotal evidence. Their anecdotal evidence consisted of nothing more than isolated examples of alleged discriminatory employment decisions, most of which did not even concern class members.

Significantly, petitioners cite only two isolated instances which they claim are examples of "mixed motives" decisions. Neither is supported by the record. Moreover, in contrast to the record in *Price Waterhouse*, respondents demonstrated in this case that the decision in both instances would have been the same if the petitioners were male.

For example, petitioner Ottaviani's reliance upon a "stray remark" by a co-worker that she was "cute," made at the time of her hire in 1967, is too tenuous to rely upon as proof that gender played a role in the decision to deny her tenure six years later. Moreover, the record firmly supports the conclusion that respondents would have denied her tenure even if she had not been a female. The District Court found that in 1973 Ottaviani's record of scholarship, growth and mastery of subject matter was weak, that she had only 8 credits towards a Ph.D., that she participated in very few professional seminars, and that in 1973, a male member of the Speech Department was also denied tenure for failing to make sufficient progress towards his Ph.D.. (A. 94)

Similarly, petitioner Jessup's reliance upon a single statement, taken out of context, that "departmental balance would allow for one such woman devoted to students, but not two" is equally tenuous. It does not prove that gender was a substantial motivating factor in the decision to deny her tenure, especially where it was undisputed that she lacked publications, and she received mixed teaching reviews.[12] Moreover, since New Paltz also

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[12] In fact, the record reveals that the operative word was "devoted", not "woman". It states ". . . a department could stand one person who may be weak in terms of substance, but is very devoted to students, but if you have a lot of members of the department that way, you are going to have a weak department." (T. 4893)

denied tenure to a male that same year, for the same reasons, the record shows that the decision would have been the same even if she were a male.

No other evidence of this type was offered on behalf of any of the other individual petitioners or class members. Consequently, the Second Circuit correctly concluded that the decision in *Price Waterhouse* did not affect this case, and no further review is warranted.

B. *The Second Circuit's Treatment Of The Statistical Evidence Was In Accord With The Decisions Of This Court And Was Not In Conflict With Decisions Of Other Circuits.*

Petitioners accuse the Court below of misunderstanding the statistical proof (p. 19), and belatedly attempt to come within the rule of *Watson v. Fort Worth Bank and Trust*, 487 U.S. ____, 108 S. Ct. 2777, 101 L. Ed.2d 827 (1988). There is no merit to either argument.

First, petitioners contend that the Second Circuit erroneously concluded that the issue of whether petitioners' statistics alone constituted a *prima facie* case became irrelevant once the District Court required respondents to introduce their proof. In fact, the Court's conclusion in this regard is in accord with this Court's decisions and not in conflict with decisions of other Circuits. As this Court explained in *Bazemore*:

> if the respondents . . . have responded to the petitioners' *proof* by offering evidence of their own, the factfinder then must decide whether the petitioners have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the *only issue to be decided at that point* is whether the petitioners have actually proved discrimination.

478 U.S. at 398 (emphasis supplied, citations omitted); *see also EEOC v. Sears*, 839 F.2d 302, 309 (7th Cir., 1988), ("the fact

that the plaintiff proved a *prima face* case is of no continuing consequence" once a defendant responds to plaintiff's proof); *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 461 (9th Cir.), *cert. denied*, 108 S. Ct. 158, *reh. denied*, 108 S. Ct. 473 (1987) (". . . the only relevant burden in a class action disparate treatment case, assuming petitioners can avoid Rule 41 dismissal, is upon petitioners to prove the existence of discriminatory intent."); *Vuyanich v. Republic Nat. Bank of Dallas*, 521 F. Supp. 656, 661 (N.D. Tex. 1981, *vacated on other grounds*, 723 F.2d 1195 (5th Cir.), *reh. denied*, 736 F.2d 160 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984) ("In a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence – to highlight the issues in contest – is about as relevant as a minuet is to a thermonuclear battle.")

Second, petitioners criticize the Second Circuit's affirmance of the District Court's finding that differences of "one to three standard deviations" in this case did not establish a *prima facie* case. Such criticism is unfounded, however, since the Court's conclusion is in accord with well established law. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977) ("[w]here *gross* statistical disparities can be shown, they alone *may* in a *proper* case constitute *prima facie* proof of a pattern or practice of discrimination."); *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); *Teamsters v. United States, supra*, 431 U.S. 324, 340 n.20; *Coser v. Moore*, 587 F. Supp. 572, 576-77 (E.D.N.Y. 1983), *aff'd*, 739 F.2d 746 (2d Cir. 1984); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). *See also EEOC v. Sears*, 839 F.2d at 309 (7th Cir. 1988) (affirming a finding by the district court that there was no discrimination even where there was a difference of more than three standard deviations); *Chang v. University of Rhode Island*, 606 F. Supp. 1161. 1189 (D.R.I. 1985) ("even a finding of two or more standard deviations does not prove the existence of discrimination"); *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987).

Thus, the Court below, while noting that, in appropriate cases, statistics alone may be sufficient to prove a *prima facie* case if they show gross disparities (A. 22), concluded after

careful consideration, that petitioners' statistics failed to meet this standard.[13] Its conclusion is supported by this Court's statement in *Watson*, "that there simply is no minimum threshold level of statistical significance which mandates a finding that Title VII petitioners have made out a *prima facie* case." (A. 18)

Petitioners further argue that this Court should review this case so that they can benefit from the recent decision in *Watson*. Pet. page 29. Petitioners concede, however, that this "case was tried and argued on the theory that it was a disparate treatment case." Pet. page 27. In fact, they chose to proceed on that theory alone even though they were fully aware of the availability of the disparate impact theory and even though this Court had decided *Watson* well before this case was fully briefed and argued before the Second Circuit. Having chosen to proceed on a disparate treatment theory alone, petitioners should not now be permitted to raise what amounts not only to a new legal argument, but a new theory of liability never raised by them in either court below. *See Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Assuming *arguendo* that petitioners may belatedly assert a disparate impact theory, the result would not be different. In *Watson*, this Court stated that a defendant should not be held liable for unintentional discrimination on the basis of less

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[13] Similarly erroneous is petitioners' contention that the Second Circuit "has set up a new and novel standard for discrimination in class action cases" when it noted that the number of standard deviations shown in plaintiffs' expert's "most persuasive" studies were "not significant in every year of the liability period". Pet. page 21. Just as the court did not adopt a hard and fast rule that two or three standard deviations establish a *prima facie* case, the Second Circuit did not establish a rule that statistically significant disparities *must* be shown in every year. Rather, the court's statement that such disparities were not shown in every year was merely an observation of one more defect in a statistical presentation that was severely flawed in a number of other respects. Petitioners' reliance on *Bazemore* is inapposite. In that case, there was overwhelming evidence of pre-Act discrimination which gave credibility to the three years of post-Act statistics showing statistically significant disparities. 478 U.S. at 401.

evidence than is required to prove intentional discrimination. 487 U.S. at ____, 108 S. Ct. at 2785. Therefore, the District Court's finding in this case that petitioners' statistics alone are not sufficient to establish a *prima facie* case under a disparate treatment theory, *a fortiori* precludes a finding that the statistical evidence was sufficient to establish a *prima facie* case under a disparate impact theory.

Accordingly, the standards by which the Second Circuit reviewed the statistical evidence were entirely consistent with relevant precedent.

C. *The Second Circuit's Decision Is Not In Conflict With* Bazemore v. Friday

In Point III of their petition at page 22, petitioners maintain that the courts below "disregarded the imperative ruling of *Bazemore*." This charge is unfounded.

Contrary to petitioner's contention, the Second Circuit devoted a separate section of its opinion to a careful and thorough analysis of petitioners' *Bazemore* allegations. (A. 25) The Court correctly noted that *Bazemore* requires an employer "to eradicate employment discrimination that began prior to the effective date of Title VII (1972), if the discrimination continues into the post-1972 liability period", (A. 25), and that, under *Bazemore*, statistical evidence of pre-Act discrimination can be probative of ongoing, post-Act discrimination. *Id.*

However, the Court found that, where, as here, no pre-1972 salary discrimination was or could be found in the record before it, petitioners' attempt to create a *Bazemore*-type violation must be rejected. In particular, the Second Circuit found that, in marked contrast to *Bazemore*, and its own decision in *Sobel v. Yeshiva University*, 839 F.2d 18 (2d Cir. 1988), *cert. denied*, 490 U.S. ____, 109 S. Ct. 3154, 104 L. Ed. 2d 1018 (1989), where the petitioners had offered direct, independent proof of pre-Act discrimination, the petitioners here failed to produce such evidence. Indeed, the Court noted that "even though the Supreme Court handed down its decision in *Bazemore* the same

month that petitioners' trial commenced, the petitioners did not introduce any statistical evidence of substance to prove that there was discrimination at New Paltz prior to the effective date of Title VII." (A. 26)

By contrast, respondent produced the only salary studies relating to pre-Act decisions for the years 1971 and 1972. These studies, accepted and relied upon by the Court below, showed that there were no statistically significant differences in the salaries of men and women in those years. (E 507) More is not required to defeat a *Bazemore* claim.[14]

D. *The Issue Of Which Party Bears The Burden Of Validating "rank" As An Independent Variable In a Multiple Regression Analysis Is Irrelevant In This Case*

This Court has conclusively held that in a Title VII class action, it is the plaintiffs who bear the ultimate burden "to prove discrimination by a preponderance of the evidence" with respect to *each* of their claims, *U.S Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). In this case, petitioners claim that New Paltz discriminated against women with regard to initial rank and current rank, as well as salary. Although they have the burden of persuasion with regard to proving their claims of discrimination in rank and salary, they urge this Court to adopt a rule requiring respondents to validate the use of rank

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[14] Insofar as petitioners challenge the exclusion of exhibit 990 as a failure to comply with *Bazemore*, this charge, too, lacks merit and is unworthy of review by this Court. The record shows that petitioners' exhibit 990 purports to be a tabulation of women and men with no Ph.D. and no prior college teaching experience had the initial rank of instructor and how many held a higher rank. The exhibit, however, does not distinguish between persons hired before or after 1973 and does not show promotions which occurred before the effective date of Title VII (SA 276). Moreover, it includes persons holding only part-time positions in the Division and it omits full-time persons hired before 1973. Furthermore, it controls only for the absence of two qualifications (*i.e. no* Ph.D., *no* prior college teaching) and is cumulative of other evidence. Accordingly, as the Court below specifically held, it is so unreliable and incomplete as to be irrelevant. See *Bazemore*, 478 U.S. at 400, n.10.

with regard to their salary claim. Such a rule would effectively relieve petitioners of their ultimate burden of proof in this case.

Assuming *arguendo* that petitioners had not alleged a separate claim that rank at New Paltz was discriminatory, they should still bear the burden of proving any alleged defects in respondents' statistical proof, just as respondents bear the burden of proving defects in petitioners' proof. The revelation of any such defect, however, affects only the weight of the statistical evidence. It does not alter petitioners' burden of persuasion that discrimination has occurred. *See Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985). As this Court has repeatedly recognized, statistical evidence may be presented in a Title VII case in an infinite number of ways and the sufficiency of such evidence is necessarily subject to challenge on a case-by-case basis. *See Teamsters*, 431 U.S. at 340.

In any event, this is not the case in which to address the issue petitioners seek to raise. As the Second Circuit aptly noted, "at trial, [petitioners] failed to adduce any significant statistical evidence of discrimination as to rank" (A. 23). In affirming the decision of the District Court, the Court below recognized that petitioners' evidence as to rank, rank at hire and waiting time for promotion were mere compilations of data, "which neither accounted for important factors relevant to assignment of rank and promotion, 'nor demonstrated that observed differences were statistically significant.' " (A-23) At the same time, as the District Court found and the Second Circuit agreed, respondents offered "persuasive objective evidence" validating their use of the rank variable. Respondents demonstrated that there was no sex discrimination at New Paltz in either rank at hire or promotion between 1973 and 1984. (SE 342, E494, SA 675-78, 673-74). Thus, even if respondents had the burden of validating rank, that burden was met here in all respects.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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